A

KASAYAH DHALIN HUSSEIN

v.

PP

B

HIGH COURT MALAYA, KUALA LUMPUR
KAMARDIN HASHIM J
[CRIMINAL APPLICATION NO: 44-126-07/2012]
24 SEPTEMBER 2012

C ***CIVIL PROCEDURE:*** *Jurisdiction - High Court - Somalian accused charged under Firearms (Increased Penalties) Act 1971 - Whether Malaysian court has jurisdiction to try accused of shooting at Malaysian navy personnel in high seas off Oman - Whether s. 22(1)(b)(iv) Courts of Judicature Act 1964 conferred jurisdiction on High Court - Whether*
D *certificate issued by Attorney General under s. 127A(1)(d) Criminal Procedure Code regularised jurisdiction conferred upon High Court*

E The applicant, a Somalian, was jointly charged with six other Somalians in the High Court under s. 3 of the Firearms (Increased Penalties) Act 1971 with discharging firearms at the Royal Malaysian Navy ('RMN') personnel while hijacking a ship in the Indian Ocean about 250 nautical miles off Oman. A special team from the RMN arrested the applicant and six others and brought them to Malaysia where they were re-arrested by the police. The
F applicant applied to stay or strike out the charge against him, arguing that the Malaysian High Court had no jurisdiction to try him for the purported offence as it occurred outside the local jurisdiction of the High Court on a vessel which was not registered in Malaysia. The applicant contended that the certificate
G issued by the Attorney General ('AG') under s. 127A(1)(d) of the Criminal Procedure Code ('CPC') which stated that the alleged offence threatened Malaysia's security, was flawed and void and should be set aside. The applicant argued that the AG had no reasonable ground to certify that national security had been
H threatened as the incident happened far from the Malaysian territory and on a Panamanian-owned vessel. There was no affidavit evidence to explain how national security had been threatened. The AG's certificate was also attacked on the ground proviso (i) of s. 127A(1) CPC whereby it had not been complied
I with. The prosecution contended that the High Court did have jurisdiction under s. 22(1)(b)(iv) of the Courts of Judicature Act 1964 ('CJA') to try offences under any written law if the AG certified that the commission of such offences affected the security

of Malaysia even though the offence was committed by a non-citizen against a Malaysian outside Malaysia. It was submitted that since the attack was on the RMN personnel who were Malaysian citizens, the AG was satisfied that the incident threatened national security and his satisfaction in that regard was not open to question.

Held (dismissing application):

(1) Section 22(1)(b)(iv) CJA conferred jurisdiction on the High Court to try the offence allegedly committed by the applicant. The section was clear and unambiguous. There was no truth to the contention that the AG's certificate under s. 127A(1) CPC conferred the jurisdiction on the court. The jurisdiction was conferred by the CJA which was the substantive law in this matter and not by the AG by virtue of his certificate. The certificate only procedurally regularised the court's jurisdiction to try the case. (paras 14 & 30)

(2) The court agreed that the act of shooting at the RMN personnel and their ship amounted to threatening the security of Malaysia. In what manner the action of the applicant and his six co-accused amounted to affecting the security of Malaysia would be adduced in evidence by the prosecution during the trial proper. (para 27)

(3) It was not possible to obtain the sanction of any diplomatic officer as the incident took place on the high seas approximately 250 nautical miles from Oman. There was no indication that there was a diplomatic officer in charge for that place or area on the high seas. (para 27)

(4) The AG did not issue the s. 127A(1) certificate mechanically but after careful thought. The certificate was therefore valid, proper and enforceable. (para 31)

Case(s) referred to:

Connelly v. Director of Public Prosecutions [1964] AC 1254 ***(refd)***
Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***
Datuk Yong Teck Lee & Ors v. PP [1996] 2 CLJ 413 CA ***(refd)***
Director of Public Prosecutions v. Humphrys [1977] AC 1 ***(refd)***
Hui Chi-Ming v. R [1991] 3 All ER 897 ***(refd)***
Johnson Tan Han Seng v. PP [1977] 1 LNS 38 FC ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Maxwell v. R [1995-1996] 184 CLR 501 ***(refd)***

A *Pemilik Kargo yang baru dimuat ke atas Kapal atau Vessel MV Jui Cheng (sekarang dikenali sebagai Te Hsing) v. Pemilik atau Pencarter Demis Kapal atau Vessel MV Jui Cheng (sekarang dikenali sebagai Te Hsing) [2008] 4 MLJ 630* ***(not foll)***
PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***
B *PP v. Datuk Harun Haji Idris & Ors [1976] 1 LNS 180 HC* ***(refd)***
PP v. Datuk Hj Wasli Hj Mohd Said [2005] 4 CLJ 223 HC ***(refd)***
R v. Attorney General's Reference (No. 2 of 2000) [2001] 1 Cr App R 36 ***(refd)***
Regina v. Chairman, County of London Quarter Sessions, Ex parte Downes [1954] 1 QB 1 ***(refd)***
C *Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC* ***(refd)***
Sharma v. Brown-Antoine and Others [2007] 1 WLR 780 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 22(1)(a)(i), (b)(iv)
Criminal Procedure Code, ss. 127A(1)(d), 158, 376
D Federal Constitution, art. 145(3)
Merchant Shipping Ordinance 1952, s. 13
Specific Relief Act 1950, s. 54

Other source(s) referred to:
E *Halsbury's Laws of England,* 4th edn, Reissue, vol. 43(2), para 1414

For the applicant - Edmund Bon Tai Soon (Chan Yen Hui with him); M/s Chooi & Co
For the respondent - Mohd Abazafree Abas (Yusaini Amir, Mohd Najib Zakaria & Lailawati Ali with him); DPPs

F *Reported by Ashok Kumar*

JUDGMENT

G **Kamardin Hashim J:**

The Application

[1] This is an application by way of a notice of motion filed by
H the applicant, who is a Somalian, to stay and/or strike out the charge against him. The application was supported by the affidavit in support by the applicant himself, affirmed on 19 June 2012 and also by the applicant's second affidavit in support, affirmed by the solicitor of the applicant, Chan Yen Hui on 3 July 2012.

I **[2]** The respondent, in objecting to the application, filed an affidavit in reply by the Attorney General himself, Y Bhg Tan Sri Dato' Seri Panglima Abdul Gani Patail, affirmed on 8 August 2012.

[3] The applicant was jointly charged with six others in this court *vide* Criminal Trial No.45D-23-2011 as follows:

> Bahawa kamu bersama-sama pada 20 Januari di antara jam 8.10 hingga 10.00 malam di atas kapal Bunga Laurel berkoordinat di Lat. 20' 14.73 N Long. 083' 39.96 E, 250 batu nautika dari perairan Oman lanjutan dari niat bersama kamu pada masa melakukan kesalahan berjadual iaitu rompakan, telah melepaskan tembakan daripada senjata api ke arah pasukan Angkatan Tentera Malaysia dengan niat untuk mendatangkan kematian atau kecederaan. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) dan boleh dihukum di bawah seksyen yang sama di baca bersama seksyen 34 Kanun Keseksaan.

[4] The application herein was filed before the hearing of the Criminal Trial No. 45D-23-2011 which was fixed on the same date.

[5] The application was advanced on two following grounds, namely:

(a) The High Court of Malaya has no jurisdiction to try the purported offence as stated in the charge against the applicant; and

(b) The certificate issued by the Attorney General dated 11 February 2011 under s. 127A(1)(d) of the Criminal Procedure Code ("CPC") is wrong, flawed, null and void, and should be set aside.

Brief Facts

[6] The applicant was arrested by the PASKAL Special Team from the Malaysian Navy on board a ship named Bunga Laurel together with six other Somalians. Before that, the applicant together with six others were in the process of hijacking the ship where firearms had been discharged. The purported hijack occurred at position of Lat. 20' 14.73 N Long. 083' 39.96 E, in the high seas approximately 250 nautical miles from Oman. After their arrest, all of them were brought back to Malaysia. They were re-arrested by DSP Shazeli bin Kahar and his team on 31 January 2011 at Westport, Pulau Indah, Selangor Darul Ehsan after reaching Malaysia.

[7] On 21 January 2011, at about 1.30am at the Emergency Response Center, MISC Berhad Headquarters, Dayabumi Complex, Kuala Lumpur, one Sharudin bin Hj Yusof, an Executive Officer of MISC received information that the ship Bunga Laurel had been hijacked by a group of unknown persons on the Indian Ocean.

[8] I will now discuss the grounds of the application in turn.

Ground 1: The High Court Of Malaya Has No Jurisdiction To Try The Purported Offence Stated In The Charge Against The Applicant

[9] Mr Edmund Bon Tai Soon, learned counsel for the applicant submits that this court has no jurisdiction to try the offences alleged against the applicant pursuant to s. 22(1)(a)(i) of the Courts of Judicature Act 1964 ("CJA") on the following reasons:

(a) That the alleged offence as stated in the Charge Sheet occurred at the position of Lat. 20' 14.73 N Long. 083' 39.96 E, 250 nautical miles from the high seas of Oman;

(b) That based on the search from http://itouchmap.com/latlong.html, the position of Lat. 20' 14.73 N Long. 083' 39.96 E is located on the land at the State of Orissa, India. The charge against the applicant is therefore unfounded as no ship could have been on the said land; and

(c) That the applicant is charged at the High Court of Malaya at Kuala Lumpur where the local jurisdiction of the court does not include the position of Lat. 20' 14.73 N Long. 083' 39.96 E.

[10] Learned counsel further submitted that this court has no jurisdiction to try the offence alleged against the applicant pursuant to s. 22 of CJA based on the following grounds:

(a) The alleged offence was committed on the high seas on board of the Bunga Laurel ship;

(b) The nationality of the Bunga Laurel ship is the main issue;

(c) All Malaysian ships must be registered under the Merchant Shipping Ordinance 1952 ("Ordinance") unless so exempted. As Bunga Laurel ship is not registered under the Ordinance,

she cannot be recognized as a Malaysian ship. The Bunga Laurel ship does not fall under any categories of the ships exempted from registration under s. 13 of the Ordinance;

(d) Evidence shows that the Bunga Laurel ship is owned by one M Cosus SA which has its business address at 53rd E Street, Urbanzacion, Marbella, MMG Tower, 16th Floor, Panama, Republic of Panama, with an address for service at Mitsubishi UFJ Lease & Finance Company Limited, Structured Finance Department, Shin Marunounchi Bldg, 1-5-1 Marunounchi, Chiyoda-ku, Tokyo, 100-6525;

(e) The Bunga Laurel ship is charted to one MISC Berhad, Malaysia. The ship is neither registered in Malaysia nor owned by a Malaysian corporation, MISC Berhad. The ship is not and/or cannot be deemed as a Malaysian ship;

(f) MISC Berhad is merely a bareboat charterer, ie, a charter party without master and crew; and

(g) At the time of the alleged offences, the Bunga Laurel ship flew the Panama flag. The nationality of the ship is Panamanian.

[11] To strengthen his submission on Ground 1, learned counsel seeks support from *Halsbury's Laws of England*, 4th edn. Reissue, vol. 43(2) at para. 1414 and the case of *Pemilik Kargo yang baru dimuat ke atas Kapal atau Vessel MV Jui Cheng (sekarang dikenali sebagai Te Hsing) v. Pemilik atau Pencarter Demis Kapal atau Vessel MV Jui Cheng (sekarang dikenali sebagai Te Hsing)* [2008] 4 MLJ 630.

[12] Learned deputy in his reply submitted that this court has jurisdiction to try the offence committed by the applicant and the six others as provided for under s. 22(1)(b)(iv) of the CJA which was inserted *vide* Act A1229 which came into effect on 6 March 2007. It is argued that jurisdiction of this court is not limited only to cases committed within local limits but the court has extra-territorial jurisdiction to hear cases outside its local limits including offences certified by the Attorney General to affect the security of Malaysia. Learned deputy further submitted that the fact that Royal Malaysian Navy had been fired at amounted to affecting the security of Malaysia.

[13] Section 22 of the CJA provides:

22. Criminal Jurisdiction.

(1) The High Court shall have jurisdiction to try:

(a) all offences committed:

(i) Within its local jurisdiction;

(ii) On the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) By any citizen or any permanent resident on the high seas on board any ship or aircraft;

(iv) By any person on the high seas where the offence is piracy by the law of nations; and

(b) Offences under Chapters VI and VIA of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976, or *offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed* as the case may be:

(i) On the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) By any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) By any citizen or any permanent resident in any place without and beyond the limits of Malaysia;

(iv) By any person against a citizen of Malaysia;

(v) By any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises in Malaysia;

(vi) By any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;

(vii) By any stateless person who has his habitual residence in Malaysia;

(viii) By any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(ix) By any person who after the commission of the offence is present in Malaysia. A

(2) The High Court may pass any sentence allowed by law. (emphasis added)

[14] On a bare reading of s. 22(1)(b)(iv) of the CJA, this court has no hesitation in concluding that this court had jurisdiction to try the charge preferred against the applicant herein. There is no ambiguity in the said provision. It is trite law that the literal interpretation must be adopted when the provision of the statue is clear without any ambiguity. It is crystal clear that sub-s. (1)(b)(iv) of s. 22 CJA conferred jurisdiction on this court to try the offence allegedly committed by the applicant on high seas which was certified by the Attorney General to be affecting the security of Malaysia. Submission of learned counsel that Bunga Laurel ship is not registered in Malaysia and that the alleged offence happened on high seas 250 nautical miles from Oman, is therefore of no consequence to this case. The location based on the latitude and longitude given in the charge found to be in a place in Orissa, India according to a search from the internet could not be ascertained by this court without oral evidence given by witnesses during the trial proper. It is instructive to note that the charge could be amended at any time before judgment at the instance of the prosecution or by the courts' own motion as provided for under s. 158 of the CPC. B C D E F

[15] Based on that premise, the reason advanced by learned counsel for the applicant is misconceived.

[16] In *Pemilik Kargo* (*supra*), the issue to be determined by the court was regarding ownership of the cargo on board of the vessel 'Jui Cheng' and the ownership of the vessel itself. It was decided that as the vessel was registered in Panama, the law applicable in determining the issue arose was the law applicable in Panama. This case has got nothing to do with the issue before this court. The *Halsbury's Laws of England* referred by learned counsel regarding charter party by demise in fact lend support to the prosecution case where in case of bareboat charter, the charterer, ie, MISC Berhad had become the owner of the Bunga Laurel ship during that particular time. G H I

[17] In the present case, the issue of ownership of the ship does not arise because the Attorney General had decided to make use of the provision as envisaged under s. 22(1)(b)(iv) of the CJA to be read with s. 127A(1)(d) of the CPC which provisions are more clear giving powers to this court to try such cases.

[18] Therefore, it is the finding of this court that there are no merits in the argument of learned counsel in respect of the first ground.

Ground 2: The Certificate Issued By The Attorney General Dated 11 February 2011 Under s. 127A(1)(d) Of The CPC Is Wrong, Flawed, Null And Void, And Should Be Set Aside

[19] Learned counsel for the applicant submits that the certificate issued by the Attorney General dated 11 February 2011 under s. 127A(1)(d) of the CPC is wrong, flawed, null and void and should be set aside. Mr Edmund Bon Tai Soon argued that on an objective basis, it is wholly conjectured to say that the alleged offence affected the security of Malaysia thus mandating the Attorney General to deal with the offence as if it had been committed within Malaysia. In support of his argument, learned counsel cited the case of *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300, and quoted the passage from Gopal Sri Ram FCJ decision of the Federal Court where His Lordship says:

> 'Public Order', 'law and order' and the 'security of the state' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the state. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the state. The true test is not the kind, but the potentiality of the act in question. One act may affect only individual while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the state (see *Kishori Mohan Bera v. The State of West Bengal* [1972] 3 SCC 845; *Pushkar Mukherjee v. State of West Bengal* 1969 (2) SCR 635; *Arun Ghosh v. State of West Bengal* 1970 (3) SCR 288; *Nagendra Nath Mondal v. State of West Bengal* [1972] 1 SCC 498).

[20] Learned counsel further submitted that the question of jurisdiction is one for the court. Upon the satisfaction of the court that the public prosecutor had, on an objective basis, reasonable grounds to find that the alleged offence by the applicant was a threat to the security of Malaysia, the court may accept the certificate of jurisdiction of the public prosecutor. On the evidence available before this court, it was submitted that the public prosecutor has failed to discharge this burden. Learned counsel asked the court to take note that the ship used by the so called Somalian Pirates and the fact that the incident occurred very far from Malaysian territory, it will never be a threat to the Malaysian security. There was no affidavit evidence to explain as to how this incident will bring a threat to the nation security. There was also no justification as to why the incident threatened the security of the nation. It is submitted that the burden is on the respondent to prove this fact and the respondent failed to discharge this burden. Counsel cited *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180 and *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 to support his contention.

[21] In *Datuk Harun* (*supra*), Abdoolcader J (as he then was) had this to say about conduct and power of the public prosecutor under the Federal Constitution:

> 'Conduct' of criminal prosecutions in Article 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular paragraph (b) thereof in List 1 (Federal List) in the Ninth Schedule to the Constitution.

[22] In *Dato' Yap Peng* (*supra*), the same judge sitting as Supreme Court Judge facing with the same issue, had this to say at pp. 317-318:

> I have in my judgment in the *Bank Rakyat* case (at pages 119-120) dealt with the powers of the Attorney General under article 145(3) and the connotation of his power to 'institute' and 'conduct' criminal proceedings. My discourse in this regard was approved and adopted by the Federal Court in *PP v. Lim Shui Wang & Others* (at page 67). I said there, and I repeat, that the power of the Attorney General under article 145(3) cannot and does not connote or extend to the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to

A do so. The power to transfer a case is a judicial power exclusively exercisable by a court in the manner provided for in sections 138, 177 and 417 of the Code. The power to transfer is similarly designated as a judicial power and provided for in section 25 and paragraph 12 of the Schedule to the Courts of Judicature Act, 1964.

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[23] On the same issue, learned counsel attacks the certificate issued by the Attorney General as defective on two reasons. The first reason was that the certificate did not state that the incident had affected the security of Malaysia. The second was C that there was no certification from a diplomatic officer as required under proviso (i) of s. 127A of the CPC before embarking onto the proviso (ii) of the same section. Counsel believed that there is a diplomatic officer stationed either in Oman or in India.

D **[24]** Learned counsel lastly submitted that in the case that this court did not have jurisdiction, the court must use the inherent power to permanently stay and/or strike out the charge against the applicant. Learned counsel urged this court to adopt the common law position set out in *Sharma v. Brown-Antoine and Others* [2007] E 1 WLR 780 at p. 794 where Privy Council has decided that:

> It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court: F *cf R v. Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, where Lord Griffiths (with whose speech Lord Bridge of Harwich, Lord Lowry and Lord Slynn of Hadley agreed) explained the rationale in the following passage, at pp. 61:
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> > G If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. My H Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law.

[25] To support his contention that this court has power to stay and/or strike out the charge against the applicant, learned counsel refers to various authorities below:

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(a) *Connelly v. Director of Public Prosecutions* [1964] AC 1254;

(b) *Director of Public Prosecutions v. Humphrys* [1977] AC 1;

(c) *Maxwell v. R* [1995-1996] 184 CLR 501;

(d) *Hui Chi-Ming v. R* [1991] 3 All ER 897; and

(e) *PP v. Datuk Hj Wasli Hj Mohd Said* [2005] 4 CLJ 223.

[26] In opposing ground 2, learned deputy submitted that the Attorney General in the certificate had sanction that the incident had threatened the security of Malaysia as the attack was against the Royal Malaysian Navy personnels who are citizens of Malaysia. The offence was for discharging firearms at the Malaysian Navies while committing robbery. The Attorney-General had satisfied that the incident could threaten the security of Malaysia and thereby in exercising powers conferred to him under art. 145(3) of the Federal Constitution, s. 376 and s. 127A(1)(d) of the CPC, had certified that the incident had in fact threaten the security of Malaysia. Satisfaction of the Attorney General in this matter cannot be questioned. In *Darma Suria* (*supra*), facts of the case only involving smuggling of cars out from Malaysia, had been classified as against public order and threatening the security of Malaysia. Whereas in our case, the Royal Malaysian Navy ship and its crews had been shot at which is more serious. In the instant case, Malaysian sovereignty and dignity was affected because of the incident and our nations security was threatened.

[27] I agree that an act of shooting at the Royal Malaysian Navy personnels and ship amount to threatening the security of Malaysia. I belief that in what manner action of the applicant and six other accused persons calculated to amounting to affect the security of Malaysia, the evidence will be adduced by the prosecution during the trial proper. As regards to the learned counsel argument on question of sanction from a diplomatic officer, this is not possible as the incident has taken place on the high seas approximately 250 nautical miles from Oman. There is no indication that there is one diplomatic officer in charge for this place or area on the high seas.

[28] Section 127A of the CPC is read as follows:

127A. Liability for offences committed out of Malaysia

(1) Any offence under Chapters VI, VIA and VIB of the Penal Code, or any offence under any of the written laws specified in the Schedule to the Extra-territorial Offences Act 1976, or *any offence under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed*, as the case may be:

(a) On the high seas on board any ship or on any aircraft registered in Malaysia;

(b) By any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(c) By any citizen or any permanent resident in any place without and beyond the limits of Malaysia;

(d) **By any person against a citizen of Malaysia;**

(e) By any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

(f) By any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;

(g) By any stateless person who has his habitual residence in Malaysia;

(h) By any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(i) By any person who after the commission of the offence is present in Malaysia, may be dealt with as if it had been committed at any place within Malaysia:

Provided:

(i) that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in Malaysia unless a diplomatic officer, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be inquired into in Malaysia; and

where there is no diplomatic officer, the sanction of the Public Prosecutor shall be required:

(ii) that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of West Malaysia.

(2) For the purpose of this section the expression "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964. (emphasis added)

[29] It is clear from reading the above provision of the law that any offence under any written law committed against citizen of Malaysia which is certified by Attorney General as offences affecting the security of Malaysia can be tried in Malaysia even though the offence was committed by non citizen outside Malaysia. The applicant was charged for an offence under Firearms (Increased Penalties) Act 1971 ("FIPA"). FIPA is a written law in Malaysia. This is my interpretation of the provision highlighted above. Before this court could exercise the extra-territorial jurisdiction, there must be first a certificate from Attorney General under s. 127A(1) and sanction under the proviso (ii) of that s. 127A(1) of the CPC. This court was forwarded with the respective certificate, requisition and sanction from the prosecution to proceed with the trial of the applicant and six others before this court. I found that all the documents are in order, proper and acceptable.

[30] Learned Mr Deputy urged this court to differentiate principles laid down in *Datuk Harun* (*supra*), *Dato' Yap Peng* (*supra*) and *Sharma* (*supra*) cited by the applicant's counsel. In all those cases, what was decided was that the prosecution cannot extend jurisdiction to the court which have no jurisdiction to try the matter. Whereas in our case in hand, jurisdiction to this court was conferred by s. 22 of the CJA and the power of the Attorney General in issuing the certificate under s. 127A(1) of the CPC is just to regularise this court jurisdiction in trying the case against the applicant which offence was committed at high seas against Malaysian citizen. I agree with the proposition by learned

A Mr Deputy. In our case, jurisdiction of this court conferred by the CJA, which is the substantive law in this matter and not by the Attorney General by virtue of the certificate issued. Whereas the certificate, the sanction and requisition issued by the prosecution under the CPC, which is the procedural law merely to regularise
B the jurisdiction of this court to try the case against the applicant. Therefore there is no truth in the learned counsel allegation that by issuing the certificate, the Attorney General is exercising powers to confer jurisdiction onto this court.

C **[31]** Learned Mr Deputy moved this court to the decision of the apex court in the case of *Long Samat & Ors v. PP* [1974] 1 LNS 80 and *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38 and another case by His Lordship Gopal Sri Ram JCA (as His Lordship then was) in the case of *Repco Holdings*
D *Bhd v. PP* [1997] 4 CLJ 740. In all the cases, after considering art. 145(3) of the Federal Constitution and s. 376 of the CPC, the courts are of the view that the Attorney General has a very wide discretion over the control and direction of all criminal prosecutions. Anyone who is dissatisfied with the Attorney
E General's decision in exercising his discretion should seek his remedy elsewhere, but not in the courts. Discretion had been defined as "liberty of deciding as one thinks fit". I would agree that the Attorney General have given his thought and concentrating his mind before certifying that the offence committed
F by the applicant are threatening Malaysian security. The Attorney General, to my mind is not mechanically making his decision in issuing the certificate under s. 127A(1) of the CPC. The certificate issued by the Attorney General in the instant case is therefore valid, proper and enforceable. Therefore, ground 2 advanced by
G the applicant's learned counsel is bound to be failed as well.

[32] Mr learned deputy further submitted that based on decided cases, the court have limited power to stay or to strike out charges properly proffered against an accused person. Authorities
H cited by learned deputy was the case of *Connelly v. Director of Public Prosecutions* [1964] AC 1254; *Director of Public Prosecutions v. Humphrys* [1977] AC 1; *R v. Attorney General's Reference (No. 2 of 2000)* [2001] 1 Cr App R 36 and *Regina v. Chairman, County of London Quarter Sessions, Ex parte Downes* [1954] 1 QB 1.

I **[33]** Lastly, Mr Deputy submitted that under s. 54 of the Specific Relief Act 1950, injunction cannot be granted to stay proceedings in criminal matter. The decided authority cited was the case of

Datuk Yong Teck Lee & Ors v. PP [1996] 2 CLJ 413, where Court of Appeal decided that as the prohibition applied was in the nature of an injunction, therefore could not be issued as the matter were perfectly under the jurisdiction of the court.

[34] It is this court's view that the inherent power of the court in granting stay or striking out charges against an accused person can only be exercised in clear cases where the court are found to be lacking in jurisdiction. Where jurisdiction of the court is very clear, the court simply do not have the power to strike out charges against an accused person. It is my finding that this court has jurisdiction to try the applicant and the six others for the offence as charged.

[35] Malaysia became a party to the United Nations Convention on the Law of the Sea ("UNCLOS") on 13 November 1996. Articles 100, 101 and 105 authorise member states to seize pirate ship and to arrest the persons involving in piracy. Member states authorize to bring suspected pirates to trial. Therefore, any member state has an uncontroversial power to seize any ship suspected of being used by pirates, arrest its crew and bring them to its territory for being tried in its court. Under the 198 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention") where Malaysia also acceded to have a duty to adopt all the national laws necessary to assure the prosecution of any act of violence at sea. Member states are allowed to use a strong approach when nationals of their own states were victim of hijacking. What the Malaysian Navies did in this case is not only allowed by our local laws but also within the spirit of UNCLOS and SUA Convention. This action by the Malaysian authorities are semblance of what had been taken by the French Navies in the seizure of yacht *Le Ponant* and of the American Navies in the case of seizure of cargo ship *Maersk Alabama* by the pirates. In both cases the respective national navies arrested the pirates and put them in the hands of their national courts. Malaysia too, had have to take positive and certain action in defending their citizens and interest abroad especially while on high seas.

[36] For various reasons adumbrated above, I found that there was no merit in the applicants' application. The application as in the notice of motion in encl. 4 is therefore dismissed.